

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
ITC^DELTACOM COMMUNICATIONS, INC.)
and BUSINESS TELECOM, INC.)
For Approval of Guarantee of)
Indebtedness.)

DOCKET NO. 2006-0408

DECISION AND ORDER NO. 23119

Filed December 7, 2006
At 10 o'clock A.M.

Broderick K. Kane
for Chief Clerk of the Commission

DIV. OF CONSUMER ADVOCACY
DEPT. OF COMMERCE AND
CONSUMER AFFAIRS
STATE OF HAWAII

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Broderick K. Kane

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DECISION AND ORDER

By this Decision and Order, the commission, on its own motion, waives the requirements of Hawaii Revised Statutes ("HRS") §§ 269-19, 269-17, and 269-7(a), to the extent applicable, for BUSINESS TELECOM, INC. ("BTI") and ITC^DELTACOM COMMUNICATIONS, INC. ("DeltaCom") (collectively, "Applicants"), to guarantee the indebtedness of the subject transaction described below.

I.

Background

A.

Description of the Subject Entities

ITC^DELTACOM, INC. ("ITCD") is a publicly-traded Delaware holding company headquartered in Huntsville, Alabama, that through its operating subsidiaries, BTI, DeltaCom, and INTERSTATE FIBERNET, INC. ("IFN"), provides: (1) voice and data telecommunications services on a retail basis to business and residential customers in the southern United States area; and

(2) regional telecommunications transmission services over its network on a wholesale basis to other telecommunications companies.

BTI is a North Carolina corporation authorized to provide: (1) interexchange telecommunications services in all fifty states; and (2) competitive local exchange services in over twenty states. In Hawaii, BTI is authorized to provide intrastate telecommunications services on a resold basis.¹

DeltaCom is an Alabama corporation and a wholly owned subsidiary of IFN, which in turn, is wholly owned by ITCD, DeltaCom's ultimate parent holding company. DeltaCom provides interexchange telecommunications services and competitive local exchange telecommunication services, and is authorized to provide long distance telecommunications services in all fifty states. In Hawaii, DeltaCom is authorized to provide intrastate telecommunications services on a resold basis.²

TENNENBAUM CAPITAL PARTNERS, LLC ("TCP") is a private investment firm whose "management includes professionals with a strong telecommunications background."³

¹In re Business Telecom, Inc., dba BTI, Docket No. 98-0143, Decision and Order No. 16358, filed on June 2, 1998 (reseller of intrastate telecommunications services).

²In re ITC^DeltaCom Comm., Inc., dba ITC^DeltaCom, Docket No. 98-0408, Decision and Order No. 16931, filed on April 6, 1999 (reseller of intrastate telecommunications services). See also In re ITC^DeltaCom Comm., Inc., dba Business Telecom, Inc., Docket No. 05-0133, Decision and Order No. 22007, filed on September 2, 2005, at 3 n.4; and In re ITC^DeltaCom Comm., Inc., dba Business Telecom, Inc., Decision and Order No. 21890, filed on June 24, 2005, at 3 n.5.

³Application and Verification, filed on October 12, 2006 (collectively, "Application"), at 3.

B.

Application

On October 12, 2006, BTI and DeltaCom filed their application seeking any and all necessary approvals from the commission for BTI and DeltaCom to guarantee the debt financing of its ultimate parent, ITCD.⁴

As described in the Application, ITCD has received a commitment for an additional \$21 million in debt financing from TCP, pursuant to an amendment to an existing Note Purchase Agreement dated July 26, 2005. IFN will serve as primary obligor of the debt, while BTI and DeltaCom will serve as guarantors. Specifically: (1) TCP will make a \$21 million senior secured loan to IFN, with the proceeds used for general corporate purposes; and (2) the loan will be secured by the assets of BTI, IFN, ITCD, and DeltaCom.

Applicants represent that the subject transaction will serve the public interest by: (1) ensuring that operational needs are funded and that the companies have sufficient liquidity, thereby enabling ITCD and its subsidiaries to continue their provision of telecommunications services at competitive rates; and (2) "directly benefit[ing] consumers by facilitating the continued provision of innovative, high-quality

⁴BTI and DeltaCom served copies of their Application upon the Department of Commerce and Consumer Affairs, Division of Consumer Advocacy ("Consumer Advocate"), an ex officio party to this proceeding, pursuant to HRS § 269-51 and Hawaii Administrative Rules ("HAR") § 6-61-62(a).

telecommunications services to the public, thereby promoting competition in the telecommunications service market."⁵

C.

Consumer Advocate's Position

On November 30, 2006, the Consumer Advocate filed its Statement of Position, recommending that the commission waive the requirements of HRS §§ 269-19 and 269-17 for the subject transaction.⁶ In the alternative, the Consumer Advocate states that it does not object to the commission's approval of the subject transaction.

Based on its review, the Consumer Advocate states that:

(1) Applicants are non-dominant carriers of telecommunications services in the State of Hawaii (the "State"); (2) Applicants represent that the subject transaction will serve the public interest by ensuring that the companies' operational needs are funded and sufficient liquidity is available to allow Applicants to continue their provision of innovative and high-quality telecommunications services in the State; and (3) competition in the telecommunications market should continue to serve the same purpose as public interest regulation even if the requested financing arrangement is executed and there is a default on the loan. In addition, the Consumer Advocate notes that "[i]f the Commission is inclined to waive the approval authority set

⁵Application, at 4.

⁶Consumer Advocate's Statement of Position; and Certificate of Service, filed on November 30, 2006 (collectively, "Statement of Position").

forth in HRS §§ 269-17 and 269-19, as recommended by the Consumer Advocate, the waiver should also extend to any filing requirements (e.g., copies of the financial agreement to complete the record). The basis for this recommendation is that the need to review and maintain copies of the financing agreement for record keeping purposes is eliminated if the need to review the proposed guarantee is waived."⁷

II.

Discussion

HRS § 269-19 provides that no public utility shall sell, lease, assign, mortgage, or otherwise dispose of or encumber the whole or any part of its road, line, plant, system, or other property necessary or useful in the performance of its duties to the public, nor by any means, directly or indirectly, merge or consolidate with any other public utility, without first having secured from the commission "an order authorizing it so to do. Every such sale, lease, assignment . . . [or] disposition . . . made other than in accordance with the order of the commission shall be void." The purpose of HRS § 269-19 is to safeguard the public interest. In re Honolulu Rapid Transit Co., Ltd., 54 Haw. 402, 409, 507 P.2d 755, 759 (1973).

HRS § 269-17 provides that, upon the commission's prior approval, a public utility corporation may issue stocks and stock certificates, bonds, notes, and other evidences of indebtedness,

⁷Consumer Advocate's Statement of Position, at 6.

payable at periods of more than twelve (12) months after the date thereof, for the following purposes, and no other:

for the acquisition of property or for the construction, completion, extension, or improvement of or addition to its facilities or service, or for the discharge or lawful refunding of its obligations or for the reimbursement of moneys actually expended from income or from any other moneys in its treasury not secured by or obtained from the issue of its stocks or stock certificates, or bonds, notes, or other evidences of indebtedness, for any of the aforesaid purposes except maintenance of service, replacements, and substitutions not constituting capital expenditure in cases where the corporation has kept its accounts for such expenditures in such manner as to enable the commission to ascertain the amount of moneys so expended and the purposes for which the expenditures were made, and the sources of the funds in its treasury applied to the expenditures.

HRS § 269-17.

Conversely, "[a] public utility corporation may not issue securities to acquire property or to construct, complete, extend or improve or add to its facilities or service if the commission determines that the proposed purpose will have a material adverse effect on its public utility operations."

HRS § 269-17. "All stock and every stock certificate, and every bond, note, or other evidence of indebtedness of a public utility corporation not payable within twelve months, issued without an order of the commission authorizing the same, then in effect, shall be void." Id.

In addition, HRS § 269-7(a) authorizes the commission to examine the condition of each public utility, its financial transactions, and "all matters of every nature affecting the relations and transactions between it and the public or persons or corporations."

Having reviewed the record, the commission finds and concludes that BTI and DeltaCom's guarantee of indebtedness appears to fall within the purview of HRS §§ 269-19, 269-17, and 269-7(a). Notwithstanding these regulatory requirements, HRS § 269-16.9(e) authorizes the commission to waive regulatory requirements applicable to telecommunications providers if the commission determines that competition will serve the same purpose as public interest regulation. Similarly, HAR § 6-80-135 authorizes the commission to exempt or waive a telecommunications carrier or a telecommunications service from the provisions of HRS chapter 269 or any other telecommunications rule, upon a determination that the exemption or waiver is in the public interest.

Here, the resold telecommunications services currently provided by Applicants are fully competitive, and Applicants are non-dominant telecommunications carriers in the State. Applicants represent that the additional debt financing will enable them to continue to offer telecommunications services at competitive rates. The commission finds that Applicants' guarantee of indebtedness is consistent with the public interest, and that competition, in this instance, will serve the same purpose as public interest regulation. Thus, the commission, on its own motion, will: (1) waive the requirements of HRS §§ 269-19, 269-17, and 269-7(a), to the extent applicable, pursuant to HRS § 269-16.9 and HAR § 6-80-135; and (2) waive the

provisions of HAR §§ 6-61-101 and 6-61-105, to the extent that the Application fails to meet any of these filing requirements.⁸

III.

Orders


THE COMMISSION ORDERS:

1. HRS §§ 269-19, 269-17, and 269-7(a), to the extent applicable, are waived with respect to Applicants' guarantee of indebtedness, as described in the Application filed on October 12, 2006.
2. The filing requirements of HAR §§ 6-61-101 and 6-61-105, to the extent applicable, are waived.
3. This docket is closed unless ordered otherwise by the commission.

⁸The commission will continue to examine each application or petition and make determinations on a case-by-case basis as to whether the applicable requirements of HRS §§ 269-19, 269-17, and 269-7(a), or any other related provision governing utility transactions, should be waived. The commission's waiver in this Decision and Order shall not be construed by any utility as a basis for not filing an application or petition involving similar transactions or circumstances.


DONE at Honolulu, Hawaii DEC - 7 2006.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By 
Carlito P. Caliboso, Chairman

By 
John E. Cole, Commissioner

APPROVED AS TO FORM:


Michael Azama
Commission Counsel

2006-0408.eh

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 23119 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

CATHERINE P. AWAKUNI
EXECUTIVE DIRECTOR
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
DIVISION OF CONSUMER ADVOCACY
P. O. Box 541
Honolulu, HI 96809

BENJAMIN W. BRONSTON, ESQ.
NOWALSKY, BRONSTON & GOTHARD
2400 Augusta Drive, Suite 255
Houston, TX 77057

Counsel for ITC^DELTACOM COMMUNICATIONS, INC. and
BUSINESS TELECOM, INC.

TONY MASTANDO
VICE PRESIDENT - REGULATORY
ITC^DELTACOM
7037 Old Madison Pike
Huntsville, AL 35806



for Karen Higashi

DATED: DEC - 7 2006